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No. 01-1104

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

RANDALL W. HANSEN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is the preeminent bar organization advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. Founded in 1958, NACDL has more than 10,000 lawyer members and 80 state and local affiliate organizations with 28,000 lawyer members committed to preserving the Bill of Rights. The American Bar Association recognizes NACDL as an affiliate organization in its House of Delegates. NACDL promotes study and research in the field of criminal law. NACDL has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice. In furtherance of its objectives over the past decade, NACDL frequently files *amicus* briefs with this Court on various criminal justice issues. *See* NACDL's website at www.nacdl.org.

This brief is submitted in support of the petitioner; *amicus* urges the Court to grant certiorari.[1,2]

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[1] Counsel for the parties have consented to the filing of this *amicus* brief; the letters are on file with the Clerk of the Court.

[2] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or their counsel.

BACKGROUND OF THE CASE

LCP Chemicals-Georgia ("LCP"), a division of Hanlin Group, Inc. ("Hanlin"), owned and operated an industrial plant in Brunswick, Georgia (the "plant") at which a mercury cell, chlor-alkali process was used to manufacture chlorine gas, sodium hydroxide, and bleach, principally for the paper and wood pulp industries. The plant generated contaminated wastewater and waste sludges. The plant also utilized other chemicals and produced hazardous substances that were subject to certain environmental regulations, including wastewater discharge limitations set forth in LCP's National Pollutant Discharge Elimination System ("NPDES") permit; the permit authorized the plant to store wastewater while awaiting treatment in LCP's wastewater treatment plant. LCP also generated hazardous wastes subject to Resource Conservation and Recovery Act ("RCRA") regulation. The plant's operations also were subject to Occupational Safety and Health Administration ("OSHA") regulations designed to ensure for the protection and safety of workers.

LCP's parent corporation, Hanlin, filed a voluntary petition for bankruptcy under Chapter 11 in July, 1991. The bankruptcy proceedings severely limited the funds available for maintenance, repair and environmental compliance at the plant. LCP had operational and compliance problems from 1993 until the plant closed in 1994, which it duly reported to the Georgia Environmental Protection Department ("EPD") in LCP's Discharge Monitoring Reports.

The volume of wastewater exceeded LCP's wastewater treatment capacity, and LCP pumped the wastewater into empty oil tanks for storage before treatment and final discharge from the

wastewater treatment plant. In 1993, LCP experienced other operational problems which it promptly reported to Georgia EDP.

When the plant closed in 1994, GA EDP turned the Brunswick plant over to the U.S. Environmental Protection Agency ("EPA"). EPA listed the facility as a Superfund site and commenced cleanup.

The United States criminally prosecuted individual officers and employees of Hanlin, including petitioner herein, for violations of federal environmental statutes: the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(d)(2)(A) and (e), the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b)(3) ("CERCLA"), and the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) ("CWA").

The criminal indictments charged the petitioner and his co-defendants with exceeding the NPDES permit limits (Counts 2-21); for storing wastewater on the cellroom floors and permitting some to escape into the environment (Counts 22-32); for storing wastewater in oil tanks (Count 33); for knowingly endangering employees by exposing them to impermissibly stored wastes and wastewater (Count 34); for taking an endangered species in violation of the Endangered Species Act (Count 42) and for conspiring to commit those violations between July 1, 1985 and February 1, 1994 (Count 1). Unlike his father Christian Hansen and the plant manager, Alfred R. Taylor, Randall was not charged with failing to notify the U.S. Government of unpermitted releases of chlorine or wastewater to the environment (Counts 35-41).

Randall Hansen was charged and convicted, as were Christian and Taylor, on all counts with which they were charged, except for Count 42 – the Endangered Species Act violation. The district court sentenced Randall Hansen to serve 46 months of

incarceration and to pay a fine of $20,000: it sentenced Christian Hansen to serve 108 months of incarceration and to pay a $20,000 fine, and it sentenced Taylor to serve 78 months of incarceration but without a fine. The district court denied the all defendants' post-trial request for a judgment notwithstanding the verdict and/or a new trial.

On August 24, 2001, the Eleventh Circuit Court of Appeals issued a 74 page *per curiam* opinion, affirming the convictions on all counts. The Eleventh Circuit improperly relied on the responsible corporate officer doctrine as a basis for finding liability under environmental criminal statutes.

Questions Presented

1. Whether the "responsible corporate officer" doctrine can be used to hold a person liable where that person no longer had the authority or the capacity to prevent the violations charged and was not in a decision-making role for the corporation at the time the violations occurred.
2. Whether a criminal conviction based on the "responsible corporate officer" doctrine for violations of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(d) & (e), the Clean Water Act, 33 U.S.C. § 1319(c), and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b) requires the defendant to have actual knowledge of each element charged in the offense.

3. Whether the "responsible corporate officer" doctrine permits felony conviction of individual corporate officers for "failure to detect" violations under environmental statutes for which Congress required proof of actual knowledge.

4. Whether a jury instruction on the doctrine of "responsible corporate officer" permits conviction for "knowing endangerment" under 42 U.S.C. §§ 6928(e) and (f) without a jury finding that the individual corporate officer was actually aware or actually believed that his conduct was substantially certain to place others in imminent danger of death or serious injury.

Issues This Brief of *Amicus Curiae* Will Address

This brief *amicus curiae* will address the issue of the erosion of the *mens rea* requirement by the expansion of the concept of "public welfare offense," particularly as applied to "environmental crimes," and the unwarranted expansion of the reach of "public welfare offense."

Importance of the Issues

Substantive criminal law has expanded enormously, and today expresses an extraordinary range of purposes including not only that of minimizing violent behavior threatening to lives and property, but also the regulation of economic enterprise, protection of the environment, correction of relations among races and genders, alteration in habits of consumption of liquor, drugs, and sex. *See, e.g.*, R. Pound, CRIMINAL JUSTICE IN AMERICA 23 (1930)) . The rise of what is often referred to as the "regulatory

state" has imposed new functions and problems on the law. One of the more troublesome of these is the cluster of problems involving the relations of the criminal law to the conduct of economic enterprise. These problems have a long history,(*see* J. Hall, THEFT, LAW AND SOCIETY 62-70 (2d ed. 1952)), but the complexity of commerce and economic activity has increased immeasurably in the last century, as have the regulatory ambitions and mandates of government. *See* F. Allen, The Morality of Means: Three Problems in Criminal Sanctions, 42 U. PITTSBURGH L. REV. 737, 742 (1981).

Although the courts, including this Court, have paid lip service to the fundamental importance of the concept of *mens rea* in our criminal law, the actual treatment of that concept has been haphazard, undisciplined and poorly reasoned. This Court has not, since the early part of the last century, addressed the issue whether there are constitutional dimensions to that concept; and its treatment of *mens rea* in that era was, in the words of one noted scholar of criminal law, "flimsy. . .dictum" that became a doctrine that "passed into our constitutional law that severe criminal punishment may be inflicted at the legislature's will, regardless of whether the defendant had any opportunity to conform his conduct to the requirements of law." H. Packer, Mens Rea and the Supreme Court, 1962 SUPREME COURT REVIEW 107, 116.

In *Hansen*, the Eleventh Circuit dangerously broadened the scope of liability in the environmental criminal arena -- despite the heavy penalties that may result from convictions under RCRA and the CWA.

ARGUMENT

Amicus curiae believes that *certiorari* is warranted in this case because the decision of the Eleventh Circuit in this case is at odds with this Court's interpretation of the requirements of the "responsible corporate officer" doctrine and fundamental precepts of criminal law with regard to *mens rea*, and that it improperly expanded and misapplied the concept of "public welfare offense" to a case involving environmental "crimes" that have severe penalties.

The Eleventh Circuit upheld an unprecedented extension of the "responsible corporate officer" doctrine, first articulated by this Court in *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1971) for strict liability misdemeanor offenses, to serious felony environmental crimes. The decision eroded the required standards for criminal liability of individual corporate officers by sustaining an intra-corporate "conspiracy" theory, predicated solely on standard business discussions among corporate executives dealing with their company's bankruptcy. The resulting standard has serious legal and policy implications; it not only will permit conviction of innocent individuals, but also ultimately will deter participation in responsible corporate behavior essential to environmental compliance.

The Eleventh Circuit's decision is symptomatic of the improper reduction of the Government's burden of proof through the elimination of the *mens rea* requirement.

I.
THE COURT SHOULD DECIDE WHETHER MENS REA IS A DUE PROCESS REQUIREMENT

Early in the last century, the concept of strict criminal liability entered this Court's jurisprudence through two cases that are remarkable for their lack of clarity and peculiar procedural contexts. See *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57 (1912) and *United States v. Balint*, 258 U.S. 250 (1922)[3]. As Professor Packer observed, "The constitutional point, only fleetingly referred to in the Government's brief [in *Balint*], was quickly dismissed by the Court. The only basis. . .was a reference to *Shevlin-Carpenter*, followed by the assertion that 'Many instances of this [dispensation with *mens rea*] are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se.' [Balint, 258 U.S. at 252] The question was not one of constitutionality, but merely of legislative intent." Herbert L. Packer, Mens Rea and the Supreme Court, 1962 SUPREME COURT REVIEW 107, 113-114.

Although this Court has narrowed the range of cases in which *mens rea* is not required for conviction, it has done so on a piecemeal basis, without confronting the constitutional due process issue head on. Indeed, one leading scholar has characterized the Court's jurisprudence on *mens rea* in harsh terms: "From beginning to end, there is scarcely a single opinion . . . of the Court which confronts the question in a fashion which

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[3] *Balint*, the foundation upon which the Court dispensed with so fundamental a protection as the requirement of *mens rea*, was decided *ex parte*, and in an opinion that was only five pages long.

deserves intellectual respect." Henry M. Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 431(1958).

Instead of undertaking a fundamental review of its somewhat disjointed and contradictory jurisprudence in this area, the Court has resorted to a piecemeal approach: by finding *mens rea* required when a statute arguably infringes First Amendment rights (*e.g. United States v. X-Citement Video*, 513 U.S. 64 (1994)); by limiting the reach of the doctrine of "public welfare offense" (*e.g. Morissette v. United States*, 342 U.S. 246 (1942), *Staples v. United States*, 511 U.S. 600 (1994)); by statutory construction and presumptions that in the absence of explicit language, and in light of the "disfavored status" of criminal laws that dispense with *mens rea*, the Court would read a statute that imposes criminal penalties as requiring proof of scienter.(*e.g., Morissette, supra, Liparota v. United States*, 471 U.S. 419 (1985), *Posters 'N" Things v. United States*, 511 U.S. 513 (1993)); or by requiring proof of actual involvement or control by a parent company (and, presumably, its officers) before liability (even civil) attaches for violations of an environmental statute (*United States v. Bestfoods*, 524 U.S. 51 (1998)).

An effort to articulate the constitutional basis of the concept of *mens rea* should be made, because what underlies that concept is the recognition that criminal sanctions are distinctive both in their severity and their moral overtones, and that their distinct character must be recognized, not only in the procedures by which they are invoked and applied, but also in the substance of what punishment is meted out. As the drafters of the Model Penal Code note:

> The liabilities involved [in criminal penalties] are indefensible, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of

> probation or imprisonment may be imposed. It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed.

Model Penal Code, sec. 2.05 and Comments at 282-283 (American Law Institute 1985).

II.

THE COURT OF APPEALS' USE OF THE "RESPONSIBLE CORPORATE OFFICER" DOCTRINE IN THIS CASE WAS AN UNWARRANTED AND DANGEROUS EXPANSION OF THE CONCEPT OF "PUBLIC WELFARE OFFENSE"

In *United States v. Dotterweich*, 320 U.S. 277 (1943) and in *United States v. Park*, 421 U.S. 658 (1975) this Court adopted the "responsible corporate officer" doctrine for a very limited category of strict liability "public welfare" or "regulatory" offenses[4], under which criminal liability may be imposed "upon a person otherwise innocent but standing in responsible relation

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[4] *See Staples v. United States*, 511 U.S. 600, 606 (1994).

to a public danger." *Dotterweich*, 320 U.S. at 281. The statute in *Dotterweich* and *Park* – the Federal Food, Drug, and Cosmetic Act – "dispense[d] with the conventional requirement for criminal conduct awareness of some wrongdoing." *Id.* Justice Frankfurter's reasoning in *Dotterweich* is reminiscent of totalitarian "ends justify the means" logic. He, and the Court, rejected defendant's plea for the constitutional protection and defendant's *mens rea* claim in only sixty-seven words:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct--awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon **a person otherwise innocent** but standing in responsible relation to a public danger. United States v. Balint, 258 U.S. 250.

320 U.S. 277, 280-281 (1943)(emphasis supplied). Professor Packer characterized this passage as "offhand" and reflecting a "primitive and rigid view of *mens rea*. . . ." H. Packer, *op. cit.* at 119.

So-called public welfare offenses (*See generally* Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933), the classic article on public welfare offenses) usually are thought of as being limited to *mala prohibita* crimes such as traffic offenses and those involving the sale of intoxicating liquor, narcotics, and impure food or drugs. (*Id.* at 72-73, 84-88)[5]. They have come to comprise a catch-all category for "any crime

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[5] *See Staples v. United States* 511 U.S. 600, 607 (1994); *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971).

construed to dispense with mens rea" (H. Packer, *Mens Rea and the Supreme Court*, 1962 SUPREME COURT REVIEW 104, 146), one that encompasses an ever-growing number and variety of strict liability crimes. *See* Model Penal Code, sec. 2.05, Comment 2, at 284-291.

Ever since Sayre gave the term "public welfare offense" currency, this category of offense has been treated as the main "exception" to the principle of *mens rea*, but it has been used by the courts as a convenient pigeon-hole for any crime construed as not requiring *mens rea*. The concept of the public welfare offense openly flouts the principle of of *mens rea*.[6]

Despite the large body of decisional law that affirms dispensing with the mental element in violations of various regulations, there is conspicuous lack of authority explicitly considering and avowing the propriety of distinctively "criminal" sanctions in statutes that are held to be public welfare offenses. Indeed, these offenses have been treated as something different from traditional criminal law, as a hybrid category to which the odium and hence the safeguards of criminal process do not attach.

And despite the long recognition of strict and vicarious

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[6] In *Staples*, the Court noted that it has "referred to public welfare offenses as 'dispensing with' or 'eliminating' a *mens rea* requirement or 'mental element,' see, *e.g., Morissette,* 342 U.S., at 250, 263, 72 S.Ct. at 249-250; *United States v. Dotterweich,* 320 U.S. 277, 281, 64 S.Ct. 134, 136-137, 88 L.Ed. 48 (1943), and have described them as strict liability crimes, *United States v. United States Gypsum Co.,* 438 U.S. 422, 437, 98 S.Ct. 2864, 2873, 57 L.Ed.2d 854 (1978). While use of the term 'strict liability' is really a misnomer, we have interpreted statutes defining public welfare offenses to eliminate the requirement of *mens rea;* that is, the requirement of a "guilty mind" with respect to an element of a crime. Under such statutes we have not required that the defendant know the facts that make his conduct fit the definition of the offense. Generally speaking, such knowledge is necessary to establish *mens rea,* as is reflected in the maxim *ignorantia facti excusat.*" *Staples*, 511 U.S. 600, 607 (1994).

liability in American criminal law, virtually no reasoned literature supports these doctrines. The arguments favoring liability without culpability rarely go beyond the assertion of Justice Jackson in *Morissette*:

> While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.

Morissette v. United States, 342 U.S. 246, 256 (1952).

This Court, however, has generally been reluctant to "expand the doctrine of crimes without intent" beyond public welfare offenses that carry light penalties. *See Morissette v. United States,* 342 U.S. 246, 260 (1952); *Staples*, 511 U.S. 600, 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea.* Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary.") and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). *See also United States v. United States Gypsum,* 438 U.S. 422, 442, n. 18 (1978) (noting that an individual violation of the Sherman Antitrust Act is a felony punishable by three years in prison or a fine not exceeding $100,000 and stating that "[t]he severity of these sanctions provides further support for our conclusion that the [Act] should

not be construed as creating strict-liability crimes"). In the case at bar, Randall Hansen was sentenced to almost four years imprisonment, his father to nine years imprisonment, and Taylor to six and one-half years imprisonment. These are hardly "light penalties" or "short jail sentences."[7]

The Eleventh Circuit's decision conflicts with this Court's prior application of the "responsible corporate officer" doctrine because it imposes liability on persons who had no responsibility or authority to prevent or correct the charged violations. The Eleventh Circuit improperly eliminated the "actual knowledge" standard by deeming the regulations at issue to be public welfare statutes and allowing the jury to convict without the Government proving that the Petitioners had the *mens rea* necessary to commit the violation.

The "actual knowledge" issue has been addressed by the Supreme Court in *Staples v. United States*, 511 U.S. 600, 616 (1994), and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994), but not in the context of environmental statutes.

The criminal provisions of the CWA and RCRA do not, properly read, impose strict liability on a defendant and converting them to "public welfare statutes" by removing the

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[7] The distinction between "light" and "heavy" punishment is somewhat blurred in any event, for a person convicted of a strict liability crime is convicted in the same court as other criminals, liable to imprisonment in the same prison, suffers the same loss of rights of citizenship, and conviction does the same "grave damage to an offender's reputation." *Morissette v. United States*, 342 U.S. 246, 256 (1952). Whatever the ultimate goals of criminal punishment, it seems clear that our system of criminal justice, by its labels and actions, intend to, and do, mark those convicted as having committed a serious wrong. *See* A. Saltzman, Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process, 24 WAYNE L. REV. 1572, 1580 (1978).

mens rea element violates constitutional guarantees of due process.

The confusion in the *scienter* requirements of the "responsible corporate officer" doctrine results from the failure of courts to distinguish the occasions when the "responsible corporate officer" doctrine is applied to true public welfare statutes from those where the "responsible corporate officer" doctrine is applied to regulations that call for explicit knowledge and impose severe criminal penalties, such as the CWA and RCRA. Several courts have properly held the government to its burden of proving a defendant's knowledge of each element of the crime and have declined to apply the public welfare offense doctrine to environmental statutes. *See United States v. Ahmad,* 101 F.3d 386 (5th Cir. 1996) (holding that the CWA is not a public welfare statute); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51-52 (1st Cir. 1991) (distinguishing RCRA, which requires specific intent, from the public welfare statutes at issue in *United States v. Dotterweich,* 320 U.S. 277 (1943) and *United States v. Park,* 421 U.S. 658 (1975).

Other courts of appeals have applied the gloss of the public welfare doctrine to "knowing" violations of RCRA and the CWA and have held persons criminally liable as responsible corporate officers without the requisite showing of specific intent. *See United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 438-39 (6th Cir. 1998); *United States v. Wilson,* 133 F.2d 251, 262-63 (4th Cir. 1997).

This Court has not explicitly addressed the *mens rea* requirement of environmental criminal statutes such as CWA and RCRA. This case presents the Court with an opportunity to clarify the confusing and contradictory standards expressed by the circuit courts of appeals and reaffirm the holdings of *Staples* and *X-Citement* in the environmental law context.

In *Hanousek v. United States,* 528 U.S. 1102, 1103-05 (2000), Justices Thomas and O'Connor called into question the application of the public welfare doctrine to the CWA in terms that are also applicable to RCRA. *Hanousek v. United States*, 528 U.S. 1102, at 1103-05 (2000). They noted that "... it is erroneous to rely, even in small part, on the notion that the CWA is a public welfare statute." They also noted that the circuits were split on this issue, and urged the Court to "further delineate [the] limits" of the public welfare doctrine. *Id.* Justices Thomas and O'Connor believe, as do most commentators and the drafters of the Model Penal Code, that the seriousness of the penalties (felonies with three to six years in prison) "counsels against concluding that the CWA can accurately be classified as a public welfare statute." *Id.* at 1104. A broad application of the public welfare statute concept is particularly pernicious because classifying criminal statutes, such as the CWA and RCRA, as public welfare statutes merely because they regulate conduct that is subject to extensive regulation and may involve risk to the community "would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities." *Id. See also, United States v. Weitzenhoff*, 35 F.3d 1275, 1295 (9th Cir. 1994)(Kleinfeld, J., dissenting), *cert. denied*, 513 U.S. 1128 (1995).

The very substantial prison sentences imposed in *Hansen* confirm Justice Thomas' and O'Connor's concerns in *Hanousek*, and weigh against classifying the CWA and RCRA as public welfare statutes. We believe that the concerns of Justices Thomas and O'Connor were well founded, and that the Court should grant *certiorari* in this case to clarify the law, and to instruct the lower courts that diminishing or eliminating the ***mens rea*** requirement is unconstitutional. We respectfully submit that, because of the serious penalties they impose, these statutes cannot be considered public welfare statutes which do not require proof of ***mens rea.***

III.

THE JURY INSTRUCTION UPHELD BY THE COURT OF APPEALS INCORRECTLY PERMITTED CONVICTION UNDER A DIMINISHED *MENS REA* STANDARD

In this case, the Eleventh Circuit upheld a diminished *mens rea* requirement for corporate officers. Although the Eleventh Circuit arguably stated the correct legal standard, the "responsible corporate officer" instruction of the trial court which it affirmed eliminated the statutory *mens rea* not only for knowing endangerment (count 34), but also for lesser RCRA offenses (counts 22-33).

A person violates RCRA if he "knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter" without a permit. 42 U.S.C. sec. 6928(d)(2)(A). This Court has held that the use of the word "knowingly" in a federal criminal statute requires "proof of knowledge of the facts that constitute the offense." *Bryan v. United States,* 524 U.S. 184, 193(1998). *See also Staples v. United States*, 511 U.S. 600, 619(1994) (interpreting implied statutory knowledge element to require proof "that petitioner knew of the features of his gun that brought it within the scope of the Act"); *Morissette,* 342 U.S. at 271 (interpreting implied statutory knowledge element to require proof that defendant "had knowledge of the facts . . that made the taking a conversion").

The "responsible corporate officer" instruction in this case required no knowledge of any particular facts constituting the offenses; it permitted the jury to convict if petitioner merely "acted knowingly in failing to . . . detect or correct the violation." (R22-200). Thus the jury was permitted to convict for failure to correct, even though the jury could find that petitioner first

acquired knowledge of the violation after its occurrence, as the district count concluded he did.(*See, e.g.*, R14-235-236 (Randall "was notified of these violations after the fact"). Further, the concept of "failure to detect" a violation authorized the jury to convict even if the defendant did not have actual knowledge at any time.

While the district count used a *mens rea concept* in the jury instruction *(i.e.*, "acted knowingly"), it also instructed the jury that the phrase "acted knowingly" meant only that a person "acts intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness." R2-188. For a defendant merely to "realiz[e] what he is doing" *(i.e.*, to be generally aware of the nature of his conduct) falls far short of an actual awareness of the circumstances and results of his conduct.

The error was even more palpable with respect to the application of the "responsible corporate officer" instruction to the "knowing endangerment" counts under RCRA. Knowing endangerment occurs only if "a person who knowingly transports, treats, stores, disposes of' or exports any hazardous waste," in violation of 42 U.S.C. sec. 6928(d), also "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." 42 U.S.C. sec. 6928(e). Congress adopted a version of the Model Penal Code's definition of knowledge specifically for RCRA's knowing endangerment provision. *See* 42 U.S.C. sec. 6928(f)(l) and Model Penal Code sec. 2.02(2)(b).[8]

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[8] *See also*, Kenneth R. Feinberg, Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code, 18 AM. CRIM. L. REV. 123, 129 (1980) ("S. 1722 replaces the confusing and inconsistent ad hoc approach to culpability that now characterizes federal criminal law with a new system that has its genesis in the Model Penal Code").

The district count's "responsible corporate officer" instruction failed to require proof that petitioner had actual knowledge -- i.e., actual awareness or actual belief – of any existing circumstances or expected results of his conduct, thus eviscerating the statutory *mens rea* requirement. It permitted the jury to convict Randall of knowing endangerment based only on a finding, at most, that he had a general awareness of the nature of his conduct within the meaning of section 6928(f)(l)(A).

The Eleventh Circuit did not recognize the significant differences in these culpability requirements, upholding the instruction merely because it included the phrase "acted knowingly."

CONCLUSION

As Justices Thomas and O'Connor stated in their recent dissent to the denial of a petition for a writ of *certiorari* in *Hanousek v. United States*, 528 U.S. 1102, 1103-05 (2000), the Court should resolve the split in the circuits and decide whether CWA and RCRA are public welfare statutes, should elucidate the scope of the "public welfare offense" concept in federal law, and should address, for the first time in a considered way, the constitutional due process implications of dispensing with proof of *mens rea* as an prerequisite for criminal conviction and punishment.

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Certificate of Service

Martin S. Kaufman, an attorney admitted to practice before the bar of this Court, hereby declares under penalty of perjury, that three copies of the foregoing brief of *amicus curiae* National Association of Defense Lawyers in support of the petitioner was served on the following counsel of record for the parties on the 1st day of May, 2002, by depositing same in a postal depository box under the care of the United States Postal Service, in a properly addressed, first class postage prepaid envelopes addressed to:

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